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No. 91-468

IN THE
Supreme Court of the United States
October Term, 1991

CHABAD-LUBAVITCH OF VERMONT,
RABBI YITZCHOK RASKIN,
Petitioners,

v.

CITY OF BURLINGTON, VERMONT, BOARD OF
PARKS AND RECREATION COMMISSION,
Respondents,

—and—

AMERICAN CIVIL LIBERTIES FOUNDATION
OF VERMONT, INC., MARK A. KAPLAN, ESQ.,
REVEREND ROBERT E. SENGHAS,
Intervenor-Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITIONERS' REPLY MEMORANDUM

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Petitioners Chabad Lubavitch of Vermont and Rabbi Yitzchok Raskin file this Reply Brief in order to bring to the Court's attention a recent ruling of the United States Court of Appeals for the Sixth Circuit and to respond to certain statements in Intervenors' opposition to our petition.

On November 27, 1991, the Sixth Circuit entered the order that appears as Appendix I, staying the lower court's permanent injunction in order to enable Chabad House of Western

Michigan to display its private Menorah on Calder Plaza in downtown Grand Rapids for a ten-day period during this year's Chanukah celebration. This order manifests the continuing and direct disagreement between the Sixth Circuit and the Second Circuit with respect to the constitutionality of such Menorah displays. The Intervenors have sought to minimize this conflict by arguing that the Sixth Circuit's prior decisions rejecting the Second Circuit's *Kaplan* ruling were stay orders rendered without "access to the trial transcript or to a written order." Intervenor-Respondents' Brief In Opposition at 11-12. Now, however, the Sixth Circuit has issued yet another order — this one following full briefing, oral argument, and access to the entire record, including preliminary and permanent injunctive orders — allowing the display of a solitary menorah in direct conflict with *Kaplan*. *See* Appendix I. It is simply implausible to assert, as the Intervenors do, that there is "no constitutional uncertainty" on this important First Amendment question.

Moreover, two additional issues in the Intervenors' brief deserve a reply. While Intervenors assert that the constitutionality of the religious display here is governed by the *Allegheny County* decision (*County of Allegheny v. ACLU*, 492 U.S. 573 (1989)), the Court in that decision expressly reserved the question presented here — that of a ***private*** religious display in a ***public forum***. By its own terms, *Allegheny County* is limited to government-sponsored displays at sites closely controlled by the government, and does not apply to privately owned, erected, and sponsored displays in a city's primary public forum for citizen speech. As the Court in *Allegheny County* stated, "[T]he creche here does not raise the kind of public forum issue presented by . . . [a] private creche in [a] public park." 492 U.S. 600, n.50 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981), and *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984, *aff'd by an equally divided Court*, 471 U.S. 83 (1985)).

As this very discussion indicates, it is *Widmar v. Vincent*, not *Allegheny County*, which provides the rule of decision in this public forum case.

Finally, it is also significant that only the American Civil Liberties Foundation — and not the City of Burlington — has opposed certiorari in this case. Indeed, the City has never indicated agreement with the rationale of the Second Circuit's *Kaplan* decision (*Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2619 (1990)), on which the court below relied. That decision erroneously required the City of Burlington to bar from a public forum one particular type of speech — the Menorah display — solely because of its religious content. This is plainly unconstitutional.

For the above reasons and those cited in our petition for a writ of certiorari, this Court should grant certiorari and review the judgment below.

Respectfully submitted,

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APPENDIX I

NOT FOR PUBLICATION

NO. 90-2337/91-1391/1448
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed
Nov 27 1991
LEONARD GREEN,
Clerk

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, Plaintiff-Appellee, v. CITY OF GRAND RAPIDS AND CHABAD HOUSE Defendants-Appellants	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

BEFORE: KENNEDY and BOGGS, Circuit Judges, and LIVELY, Senior Circuit Judge.

PER CURIAM. On December 5, 1990, the district court granted a preliminary injunction preventing the City of Grand Rapids from allowing Chabad House to erect a privately-owned menorah in Calder Plaza, a publicly-owned area near a number of governmental buildings. It concluded that such a display would violate the Establishment Clause of the first amendment. Chabad House hoped to display the menorah as part of its Chanukah celebration. On December 11, 1990, we granted a motion by Chabad House to intervene, and issued a stay of the district court's injunction, pending appeal. At that time, we indicated that Chabad House had "a substantial likelihood of succeeding on the merits. . . ." We emphasized, however, that any intimations in that opinion were subject to revision on full hearing. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303, 309 (6th Cir. 1990).

The district court subsequently conducted a further investigation of the facts, and on March 21, 1991, issued an opinion and granted a permanent injunction preventing Grand Rapids from allowing the display. Chabad House and Grand Rapids appealed to this court, and oral argument was scheduled. On October 25, 1991, Chabad House requested a stay of the injunction from the district court. When no ruling had been made by November 21, 1991, Chabad House moved this court to issue a stay of the permanent injunction. It stated that Chanukah is scheduled to begin on December 1, 1991, and noted that this court might not have reached a final decision by that time. The district court subsequently denied the stay.

After hearing oral argument, on November 22, 1991, this court has taken the merits of the appeal under advisement. In order to maintain the status quo, and in light of this court's opinion granting a stay in 1990, we grant the motion for a stay of the district court's injunction. This stay shall remain in effect until the instant appeal is decided.